BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

RECEIVED
FEB 7 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-7

To: The Commission

COMMENTS OF THE JET BROADCASTING CO., INC.

DENNIS F. BEGLEY
MATTHEW H. McCORMICK
Reddy, Begley & McCormick
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

Counsel for
THE JET BROADCASTING CO., INC.

February 7, 1997

No. of Copies rec'd 0+11
List ABCDE

TABLE OF CONTENTS

Summary

The Jet Broadcasting Co., Inc. ("Jet"), licensee of Stations WJET-TV, Channel 24, and WJET(FM), Erie, Pennsylvania, urges the Commission to take the following actions: (1) relax the local ownership rule using the Grade A contour as a benchmark; (2) repeal the "one-to-a-market" rule; and (3) forbid television local marketing agreements ("LMAs") in those situations in which a single entity will operate one half or more of the market's television stations.

As licensee of both a television station and a radio station in a small commercial television market in which there is a television LMA, Jet is uniquely qualified to offer its insight into the aforementioned matters. Jet has reaped the benefits of cross-ownership and experienced the adverse consequences television LMAs pose in small television markets. It brings to this proceeding practical experience rather than mere speculation.

I. Local Ownership

Jet concurs that relaxation of the local ownership rules is meritorious. It, however, strongly urges the Commission to reconsider its proposal to use Nielsen DMAs as the benchmark for establishing the boundaries for restricted multiple ownership. Use of DMAs offers neither accuracy nor certainty as to what is a station's market. Moreover, use of DMAs for determining the parameters of multiple ownership would penalize stations not carried by a cable system. Conversely, use of the Grade A contour provides a consistent, accurate measure of a station's market, thus should be the standard for determining the permissibility of multiple ownership.

Notwithstanding the Commission's decision as to the standard for determining the boundaries for multiple ownership, the Commission should permit television duopolies in certain situations. Due to the realities of the market -- UHF's inferior position to VHF and intense competition from other sources of media -- common ownership of UHF stations will allow them

to compete more effectively. Wholesale exemption of the duopoly rule for UHF stations, however, could undermine both competition and diversity, particularly in small television markets. Therefore, common ownership of UHF stations should be limited to situations in which a single entity will not operate one half or more of all television stations.

II. "One-to-a-Market" Rule

As Jet's experience demonstrates, common ownership of television and radio stations provides certain economies of scale, without harming competition or diversity. Rather, these economies of scale enhance overall service and programming.

Through its experience as owner of a radio station and a television station, Jet has learned that there is no correlation between the audience for a radio station as a result of the common ownership of a television station and vice-versa, since video programming and audio programming are distinct products. In addition, the Department of Justice's recent inquires into radio mergers suggest that radio and television advertising markets are equally distinct. Moreover, common ownership of radio and television stations does not translate into market power over local advertising rates because competition for advertising is sufficiently intense that any effort to raise advertising rates would be met with advertisers turning to alternative media outlets and other stations. Thus, competition does not suffer because of common ownership of radio and television stations.

Just as competition does not suffer, neither does diversity. Since the local ownership rules act to prevent undue concentration in either radio or television station ownership, there is a sufficient number of media outlets providing diverse viewpoints. Therefore, repeal of the "one-to-a-market" rule is a positive step towards deregulation and reliance on competition to foster the marketplace of ideas.

III. Television Local Marketing Agreements

The Erie, Pennsylvania television market is one in which a television LMA exists. Therefore, Jet has experienced firsthand the threat television LMAs pose to small television markets. Jet's concern focuses on television LMAs in small television markets in which a single entity is permitted to operate one half or more of the stations.

In small markets, television LMAs result in a noticeable reduction in the number of media voices, which, unlike larger markets, cannot be as readily absorbed. In small markets, there is insufficient incentive for alternative media to enter the market. Moreover, the Commission's current rules further deter replacement of these lost media voices. Hence, these media voices remain lost, and viewpoint diversity suffers.

In small television markets, LMAs harm competition as well. The economies of scale accruing to the combined entity permit it to concentrate more on programming, which leads to larger audiences. The larger audiences attract advertisers, eliminating the appeal of advertising with other stations. This significantly reduces the advertising revenue of these other stations, which greatly diminishes their ability to provide attractive programming. Eventually, singleton stations are driven off the air. Thus, since television LMAs act to destroy competition and diversity in small markets, they should be limited to situations in which a single entity does not control one half or more of the market's television stations.

Significantly, the Commission should require existing LMAs under which one half or more of the market's stations are jointly operated by a single entity to terminate within 90 days of the effective date of the Commission's rules. Grandfathering of existing combinations in these egregious situations cannot be permitted.

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	
	)	
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	
	)	
Television Satellite Stations	)	MM Docket No. 87-7
Review of Policy and Rules	)	

To: The Commission

COMMENTS OF THE JET BROADCASTING CO., INC.

The Jet Broadcasting Co, Inc. ("Jet"), licensee of Stations WJET-TV, Channel 24, and WJET(FM), Erie, Pennsylvania, herewith submits its comments with respect to the Second Further Notice of Proposed Rule Making ("SFNPRM") in the above-captioned proceedings. Specifically, Jet comments on (1) the local ownership or "duopoly" rule, (2) the radio/television cross-ownership provision of the "one-to-a-market" rule, and (3) television local marketing agreements ("LMAs").

I. Introduction

Jet's perspective as to these matters is somewhat unique. First, Jet owns a television station and a radio station in the same market.[1] Additionally, the Erie, Pennsylvania television

[1] Jet's common ownership of WJET-TV and WJET(FM) is a "grandfathered" exception to the one-to-a-market rule.

market, where Jet's radio and television stations are located, is a small market[2] with only four commercial television stations - one VHF and three UHF ("Erie television market"). Moreover, the Erie television market is an example of a small television market in which a television LMA exists. Therefore, Jet is uniquely qualified to offer insight into the above-referenced matters.

II. Local Ownership or "Duopoly" Rule

A. Use Of The Grade A Contour Should Be The Defining Characteristic For Determining The Permissibility Of Common Ownership.

In its SFNPRM, the Commission proposes to "permit common ownership of television stations in different [Nielsen] DMAs as long as their Grade A signal contours do not overlap." SFNPRM in MM Docket Nos. 91-221 and 87-8, FCC 96-438 (released November 7, 1996) at ¶13. It is the Commission's belief that Nielsen's DMAs are "a reasonable proxy of a television station's geographic market"[3] and that the "DMA region definition may be more descriptive of a broadcast television station's potential market." Id. at ¶14 (citing Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3577 (1995) ("FNPRM")).

The Commission's logic that the Nielsen DMA is an accurate measure of a station's television market is faulty. First, as the Commission concedes in another proceeding, Nielsen does not always solely rely on audience viewing patterns in determining the composition of a particular DMA. See Report and Order and Further Notice of Proposed Rule Making in CS Docket No. 95-178, 11 FCC Rcd 6201, 6225 n. 132 (1996) (citing Nielsen Media Research,

---

[2] A "small television market" shall be defined as a market in which there are four or fewer commercial television stations with overlapping Grade A contours.

[3] Id. at ¶14.

Nielsen Station Index: Methodology Techniques and Data Interpretation, 1994-95 at 2 ("Nielsen's decision regarding the creation of separate DMAs can be based on considerations other than viewing patterns") ("Nielsen Methodology")). In addition, stations can petition Nielsen to change their DMA assignments. See id. (citing Nielsen Methodology at 35). Thus, because other considerations may influence the determination of DMAs, they are not accurate measures of stations' television markets.

More importantly, reliance on DMAs, which are frequently updated, will create uncertainty in the marketplace. In other words, a station that would initially qualify to own two stations because they are located in different DMAs and their Grade A contours do not overlap may later lose such status because of shifts in DMAs. Therefore, for these reasons alone, it would be a grave mistake to use Nielsen DMAs for determining the feasibility of common ownership of television stations.

The SFNPRM further suggests that DMAs are appropriate to determine a television station's market for purposes of multiple ownership because DMAs account for the fact that "a station's over-the-air reach can be extended by carriage on cable systems . . . ." SFNPRM at ¶17. This ignores the reality that not all television stations are carried on cable systems, for a variety of reasons. Importantly, physical limitations on the number of stations that can be carried on a cable system may prevent carriage of all broadcast stations. Additionally, the Commission's "must-carry" rules limit the number of stations a cable system is obligated to carry. See 47 C.F.R. § 76.56. Cable systems, desiring to gain the greatest return, may choose among broadcast stations to satisfy their must-carry obligations. Therefore, use of DMAs to determine the permissibility of multiple ownership penalizes those stations that, for whatever reason, are not carried by a cable system.

However, the proposal to relax the local ownership rule is not without merit. As Jet suggested in its earlier comments in these proceedings, use of the Grade A contour would "more accurately reflect the area in which a station's signal may be reliably received over-the-air." Comments of The Jet Broadcasting Co., Inc. in MM Docket Nos. 91-221 and 87-8 (filed May 17, 1995) at 2 ("Jet FNPRM Comments"). While, theoretically, DMAs and the Grade B contour define the outer perimeter of a television station's market, realistically only the Grade A contour encompasses the area in which regular reception of the station's signal can be reasonably be expected. Hence, use of the Grade A contour to define the area in which common ownership of television stations is forbidden most accurately depicts the area in which all television stations directly compete.

B. Common Ownership of Two UHF Stations With Overlapping Contours Should Not Be Altogether Forbidden.

The Commission seeks comment on whether, by rule or by waiver, it should allow television duopolies in certain situations. SFNPRM at ¶¶ 29-58. Jet previously suggested that the Commission should permit common ownership of two UHF stations with overlapping contours. Jet FNPRM Comments at 3. Jet continues to support this position, but Jet would like to take this opportunity to further clarify its position.

There are obvious benefits of common ownership of two UHF stations with overlapping contours. At the same time, limitations on the permissibility of such is necessary to prevent anti-competitive abuses.

First, UHF stations are at a disadvantage with respect to VHF stations. Currently, the Commission "attribute[s] UHF facilities with only one half the audience reach of VHF stations in the same market when calculating a group station owner's national audience reach," because of "concern that UHF stations ha[ve] inherent signal reach limitations compared to VHF stations." See SFNPRM at n.60 (emphasis added); 47 C.F.R. § 73.3555(e)(3)(i).[4] In addition, UHF stations are at a disadvantage due to the fact that their channel locations are higher than those of VHF stations. In a day and age when "channel-surfing" is a common habit among television viewers, VHF stations have an apparent advantage merely because they are the earlier images to appear and grab the viewers' attention.

In addition, over-the-air television no longer dominates the "delivered video programming market," as defined in the FNPRM, and therefore must compete with other sources of delivered video programming.[5] Therefore, common ownership of UHF stations would permit efficiencies of scale, e.g., reduced overhead costs and consolidation of personnel. These savings will allow UHF stations to spend their resources on attractive programming which will permit them to compete more effectively with VHF stations and other delivered video programming sources.

However, a blanket exception permitting common ownership of UHF stations may undermine the Commission's objectives of competition and diversity. In particular, competition and diversity will suffer most in small television markets where there are only a few stations. Therefore, to diminish the likelihood of these adverse consequences in small television markets, Jet proposes that the Commission restrict common ownership of UHF stations in those situations

---

[4] In its SFNPRM, the Commission deferred reconsideration of the continued validity of the belief that UHF stations suffer "inherent signal reach limitations" until its 1998 biennial review of the broadcast ownership rules, therefore, it appears that this concept is intact until such time. SFNPRM at n. 60.

[5] At the time of the Commission's FNPRM, cable was available to almost 90% of all U.S. households, and 62.5% of all U.S. households subscribed, see FNPRM, 10 FCC Rcd at 3536, and more than 80% of U.S. TV households owned a VCR. Id. at 3538. In addition, direct broadcast satellite service is rapidly growing in popularity. See id. at 3537-38.

in which a single entity would operate one half or more of all television stations in the market. For example, common ownership of two UHF stations should not be permitted in a television market that has a total of four stations, regardless of whether they are VHF or UHF. Restricting common ownership of UHF stations to those situations in which a single entity will not operate one half or more of all television stations will ameliorate the potentially adverse consequences of reducing competition and diversity.

III. "One-to-a-Market" Rule

Previously, Jet urged the Commission to eliminate the "one-to-a-market" rule, and instead rely on the "ownership limits placed on each service to prevent undue concentration." Jet FNPRM Comments at 5. Jet owns both a television station and a radio station, grandfathered as an exception to the "one-to-a-market" rule. Through experience, Jet has learned that co-ownership of radio and television stations inevitably results in certain economies of scale without having a detrimental impact on competition and diversity.

Jet's common ownership of radio and television stations has resulted in better overall service and programming. For example, as owner of both a radio station and a television station Jet has been able to (1) improve its ability to attract "on-air-talent" who are able to work with visual and aural media; (2) improve the quality and scope of its news; and (3) enhance its public service programming. See Jet FNPRM Comments at 8-9.

At the same time, Jet has learned that "video programming and audio programming are distinct products in separate markets." Jet FNPRM Comments at 6. The number of radio listeners attracted to a particular station are not drawn to that station because the station's owner also owns a television station, nor are television viewers drawn to a television station because such station's owner also runs a radio station.

Significantly, the Department of Justice has recently begun to scrutinize certain transactions in which ownership of a number of radio stations in a market is by a single entity. In a recent speech, one DOJ official noted that "radio advertising is a relevant product market for antitrust purposes." See Lawrence R. Fullerton, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Current Issues in Radio Station Merger Analysis, Address Before the Business Development Associates Antitrust 1997 Conference (October 21, 1996) at 3. Therefore, it is not unreasonable to infer that the radio and television advertising markets are distinct markets, which will be treated separately for antitrust purposes.

Moreover, common ownership of television and radio stations does not translate into market power over local advertising rates. Because competition in both the radio and television advertising markets is so intense, any attempt to raise advertising rates would be met with advertisers turning to other stations and alternative media outlets.

Since audience sizes of television and radio stations are not reflective of the ownership of the stations and dominance over local advertising rates is not likely, the Commission's goal of protecting competition will not be sacrificed by permitting common ownership of radio and television stations in the same market. And, just as competition will not be harmed by abolishing the "one-to-a-market" rule, diversity will be preserved as well.

While the Commission has traditionally taken the view that diversity of viewpoints is directly related to "outlet" diversity,[6] it concedes that "a decrease in outlet diversity without a corresponding decrease in viewpoint diversity" is possible. See FNPRM, 10 FCC Rcd 3524, 3550 (1995). Jet continues to believe that the latter point is true with the exception of situations in which there is "undue concentration in either medium." See Jet FNPRM Comments at 7. However, the numerical limitations imposed by the local ownership rules, particularly if amended to the effect suggested by Jet, will ward against undue concentration within either medium. Relying on the local ownership rules to prevent anti-competitive abuses will eliminate the need for the "one-to-a-market" rule, irrespective of the size of the market.

Stated simply, common ownership of television and radio stations is not detrimental to either competition or diversity. In fact, as Jet's experience demonstrates, television-radio combinations will enhance overall service and programming. Therefore, the Commission should repeal the "one-to-a-market" rule and permit common ownership of radio and television stations to the extent otherwise permitted by the Commission's rules.

IV. Television Local Marketing Agreements

Jet's comments on the subject of television LMAs is particularly insightful because the Erie Market, where Jet's television station is located, is a small market in which a television LMA currently exists. Earlier this year, the Commission granted applications for the transfer

---

[6] In its FNPRM, the Commission defined "outlet" diversity as "a variety of delivery services (e.g., broadcast stations) that select and present programming directly to the public." FNPRM, 10 FCC Rcd at 3549-50.

of control of license of WICU-TV, Erie, Pennsylvania,[7] and the assignment of license of WFXP(TV), Erie, Pennsylvania[8] (collectively "Erie Applications"). See Letter of Barbara K. Kreisman, Chief, Video Services Division (July 12, 1996).

The Commission's decision granting the Erie Applications approved a transaction under which the assignee of Station WFXP(TV), NV Acquisition Co., has essentially turned the station over to SJL Communications, L.P., the transferee of Station WICU-TV, pursuant to a LMA.[9] As well as owning and operating Station WICU-TV, SJL Communications, L.P. is basically wholly responsible for all aspects of operation of Station WFXP(TV). In addition, SJL Communications, L.P. has an option to purchase Station WFXP(TV) should the Commission modify its duopoly rules to allow common ownership of more than one station in the same market. The "joint" operations of Stations WICU-TV and WFXP(TV) has been to the severe detriment of both WJET-TV and WSEE-TV, the remaining television stations in the Erie television market. Hence, Jet is fully cognizant of the adverse consequences that result when a single entity is allowed to operate one half of more of the stations in the same market.

A. Effect of LMAs In Small Television Markets

It should be understood that Jet is not opposed to all television LMAs. In fact, Jet appreciates the benefits of television LMAs in general. Jet's concern is the potential for

---

[7] File No. BPCCT-960205IE.

[8] File No. BALCT-960311IA.

[9] Despite the pendency of the Application for Review filed by Jet, SJL Communications, L.P. and NV Acquisition Co. consummated the above-referenced transactions.

television LMAs to reduce competition and diversity, a reality which is particularly prevalent in small television markets.

Even the Commission recognizes that television LMAs may negatively impact both competition and diversity in small television markets. In its SFNPRM, supposing television LMAs are determined to be attributable interests, the Commission specifically reserved the right "to invalidate an otherwise [valid] grandfathered LMA in circumstances that raise particular competition and diversity concerns, such as those that might be presented in very small markets." SFNPRM at ¶ 88.

In terms of competition, the adverse consequences of television LMAs in small television markets are twofold. First, there is a noticeable reduction in the number of media voices. Additionally, certain economies of scale free the combined entity to focus its spending on more desirable programming, which attracts larger audiences. Advertisers are prone to advertise with the combined entity because of its ability to reach larger audiences, despite the combined entity's ability to demand higher advertising rates. This eliminates the appeal of advertising with other stations which cannot command such audiences, which in turn significantly diminishes the revenue available to these other stations to spend on attractive programming. Eventually, the combined entity will drive these other stations off the air.

Diversity in small television markets also suffers if television LMAs are permitted. As already noted, there is a reduction of the number of media voices available. Unlike larger markets, the loss of this media voice in small markets cannot necessarily be replaced.[10] Small

---

[10] Jet discusses in greater detail the effects of television LMAs on larger television markets in its comments in response to the Commission's Further Notice of Proposed Rule Making in (continued...)

markets are small for a reason -- there is insufficient consumer demand and funding available to sustain numerous, diverse sources of information.

Also, the Commission's current rules further act to prevent expansion in small markets by prohibiting television and radio stations from being owned by one entity. As discussed above, cross-ownership of radio and television stations does not negatively impact either market.[11] However, it provides certain economies of scale[12] that entice broadcasters to invest in television and radio stations. Without such incentives, would-be broadcasters may be disinclined to enter a small market, and the lost media voice remains lost. The loss of a media voice in a small market unduly further concentrates an already concentrated market. As Jet already noted, viewpoint diversity is sacrificed when there is undue concentration within a medium. See supra Section III; Jet FNPRM Comments at 7.

Stated simply, while the benefits of television LMAs may further competition and diversity in large television markets, they have the opposite effect in small television markets. It is for this reason that television LMAs must be forbidden in those situations in which a single entity can operate one half or more of the market's television stations.

---

[10](...continued)
MM Docket Nos. 94-150, 92-51 and 87-154, FCC 96-436 (released November 7, 1996). See Comments of The Jet Broadcasting Co., Inc. in MM Docket Nos. 94-150, 92-51 and 87-154 (filed February 7, 1997) at 3-4. Briefly, larger markets are better able to preserve viewpoint diversity, notwithstanding the "loss" of an additional television station because there are numerous other media sources to present diverse viewpoints, e.g., radio, newspapers and cable.

[11] As Jet previously noted, radio and television programming are not fungible. See Jet FNPRM Comments at 6.

[12] For example, larger combined audiences are attractive to advertisers. In addition, joint operations permits licensees to provide programming and services they might not otherwise be able to provide but for their joint ownership.

B. The Necessity of Requiring Termination of Certain LMAs in Small Television Markets

Significantly, should a LMA exist under which the same entity operates one half or more of the market's stations, the Commission must require it to terminate within 90 days of the effective date of the rules. As demonstrated above, in small markets, the public interest, preserved through competition and diversity of viewpoints, suffers immensely if a single entity is permitted to operate one half or more of the market's stations.

It is well-established that the "public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.'" Second Report and Order in Docket No. 18110, 50 FCC 2d 1046, 1083 (1975), aff'd in part, rev'd in part, and remanded sub nom., National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), aff'd in part and rev'd in part, 436 U.S. 775 (1978)(hereinafter "Broadcast-Newspaper Cross-Ownership Order")(citing Associated Press v. United States, 326 US 1, 20 (1945) (emphasis added)). With LMAs, once "antagonistic" competitors no longer are such. Rather, would-be competitors cooperate in their efforts to disseminate information, narrowing the number of viewpoints presented. In larger markets, there is a sufficient number of sources of information that the loss of an antagonistic source would have an insignificant impact on viewpoint diversity. In small markets, however, common operation of one half or more of the market's stations results in an immediate and quantifiable reduction in viewpoint diversity. As the Commission has recognized, "this country can ill afford a monopoly on the expression of views of issues of local concern." Broadcast-Newspaper Cross-Ownership Order at 1083. Vesting in a single entity the responsibility to operate one half or more of the stations in a market has such monopolistic tendencies.

The Commission has recognized that "divestiture is a harsh remedy, one to be reserved only where the need is overwhelming and the evidence unambiguous" id., therefore, "should be limited to use in only the most egregious cases." Id. at 1080 (emphasis added). The Commission suggested that such "egregious" situations are those in which "a lack of diversity . . . reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically," a notion supported by the United States Supreme Court. Id. at 1081; See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978). The common operation of one half or more of a market's television stations would "constitute an effective monopoly in the marketplace of ideas," thus would be such an egregious case.[13] Grandfathering of existing combinations in these egregious situations can not be tolerated.[14] To allow such would be an abdication of the Commission's responsibilities to act in the public interest. Therefore, the Commission must ameliorate the adverse consequences of LMAs in these situations by requiring their termination as soon as possible.

V. Conclusion

In sum, the Commission correctly proposes to narrow the restrictions on multiple ownership of television stations in the same market. The Grade A contour, however, offers the

---

[13] It is a particularly egregious situation when a LMA exists between two television stations in a market having only four stations, and the LMA exists despite the pendency of Commission action on a Application for Review. See supra note 9.

[14] While Jet is not unaware that existing radio LMAs were grandfathered, it is important to remember that "the differences in treatment between radio and television stations . . . [are] certainly justified in light of the far greater influence of television than radio as a source for local news." See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 815 (1978).

most accurate standard of the market in which television stations directly compete, and even then, television duopolies should be permitted in certain situations. Additionally, elimination of the "one-to-a-market" rule will not adversely effect competition or diversity. Moreover, while as a general matter television LMAs may serve beneficial purposes, it is imperative that they be forbidden if they result in common operation of one half or more of all television stations in a particular market by a single entity. Finally, it is imperative that the Commission require termination of existing LMAs pursuant to which a single entity operates one half or more of the market's television stations.

THE JET BROADCASTING CO., INC.

By______________________
Dennis F. Begley

By______________________
Matthew H. McCormick

Its Counsel

Reddy, Begley & McCormick
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

February 7, 1997